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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

PATRICK WAYNE WILLIS,

Defendant and Appellant.

A139858

(Alameda County  
Super. Ct. No. 170279)

In re PATRICK WAYNE WILLIS

On Habeas Corpus.

A154925

In 2012, following a match of his DNA and a “cold case” investigation by the Oakland Police Department, defendant Patrick Wayne Willis was charged with and convicted of murdering two women in 1992. On appeal, defendant contends, among other things, that he was prejudiced by an excessive pre-accusation delay that prevented the presentation of highly exculpatory evidence.

While his appeal was pending, defendant filed a petition for writ of habeas corpus alleging, among other things, that he received ineffective assistance of counsel based on his trial counsel’s failure to file a motion challenging the pre-accusation delay. Having found that defendant articulated a prima facie case for relief, this court issued an order to show cause returnable to the trial court. Following briefing and a hearing, the trial court denied defendant’s petition. Thereafter, defendant filed a second petition for writ of habeas corpus in this court repeating the same allegations based on the new evidentiary record. This court issued an order to show cause in response to this petition.

We conclude that while the delay in charging defendant was reasonably justified by the development of previously unavailable DNA technology, the intervening death of a critical defense witness resulted in substantial prejudice to defendant. Because it is reasonably probable that the prejudice could have been lessened, if not eliminated, by the admission of this witness's hearsay statements, we conclude that defense counsel rendered ineffective assistance by failing to raise the issue by a motion to dismiss or to at least permit the introduction of a police report containing the statements of the unavailable witness. Pursuant to the petition for habeas corpus we shall therefore reverse the judgment and remand the matter for further proceedings. In light of this disposition, we shall dismiss defendant's appeal as moot.

### **FACTUAL AND PROCEDURAL BACKGROUND**

On December 6, 2012, defendant was charged with two counts of murder (Pen. Code,<sup>1</sup> § 187). With respect to the first victim, Cheryl Walker, the information alleged the special circumstances of forced oral copulation and rape by instrument or sexual penetration by force. (§ 190.2, subd. (a)(17)(iv), (xi).) With respect to the second victim, Marsha Gulley, the information alleged the special circumstances of forced oral copulation and multiple murders (§ 190.2, subds. (a)(17)(xi), (a)(3)), and an enhancement for personal use of a dangerous weapon (a knife) (§ 12022, subd. (b)(1)).

The following evidence was presented at trial:

#### ***Evidence related to murder of Cheryl Walker***

On the morning of January 29, 1992, Walker's body was found by a creek near Hillside Avenue and 82nd Avenue in Oakland. She was naked with a beer bottle inserted into her vagina and another bottle in her rectum. She had a rope wrapped around her neck. She had blood on her face and bruises all over her body. The responding officer did not see any clothing near the body and there were no signs the body had been dragged to the location.

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise noted.

A neighbor who lived near where the body was found testified that at approximately 10:30 p.m. on January 28, she heard a woman screaming for two to three minutes in the creek area. A second neighbor testified that she heard a woman screaming at approximately 4:00 or 5:00 a.m. on January 29. The screaming sounded like it was coming from the creek.

The forensic pathologist who performed the autopsy on Walker explained that the cause of death was strangulation. The toxicology report showed that Walker had low amounts of alcohol, heroin and codeine in her system at the time of her death.

Walker's body was swabbed for DNA testing. Sperm was found on the oral swab, and a low number of sperm was found on the vaginal swab. The sperm found on the oral swab came from a different source than the sperm found on the vaginal swab. The quantity of sperm found on the oral swab was sufficient for DNA typing, but there was not enough sperm on the vaginal swab to do DNA typing. A single DNA donor profile was found on the sperm on the oral swab. Defendant's DNA was consistent with the sample found on Walker's oral swab. DNA analysis of biological material found under Walker's fingernails was also consistent with defendant's DNA sample.

***Evidence relating to the murder of Marsha Gulley***

Gulley's body was found on 84th Avenue in Oakland at 3:00 a.m. on February 11, 1992. She was covered in blood and exposed from the waist down, with her pants around her knees. Evidence suggested that she was initially attacked on Hillside Avenue and the attack continued on 84th Avenue.

The forensic pathologist who performed the autopsy on Gulley testified that she had 33 stab wounds to her head, neck, arms and body. He estimated that she bled to death within three to five minutes. The toxicology report for Gulley showed alcohol and cocaine in her system at the time of her death. She had likely taken the cocaine within eight hours of her death.

Gulley's body was swabbed for DNA samples. The low number of sperm found on the vaginal swab were insufficient for DNA testing. A low, but sufficient number of sperm for DNA typing, were found on the oral swab. A partial profile of male DNA that

was developed from the oral swab was consistent with defendant's DNA profile. Testing also determined that there was one male donor to a sample of skin cells taken from Gulley's pubic hair, but defendant was excluded as the donor for that sample.

### ***Evidence of Sperm Persistence Theory***

The prosecution called an expert in the field of forensic DNA analysis to testify regarding sperm persistence theory. She testified that DNA as biological material begins to degrade when stored in a human environment. "Sperm persistence" looks at how long sperm will survive in a particular body cavity. She testified that generally sperm can live for up to two weeks in the vaginal cavity of a living person. In the oral cavity, the average is only about six hours in a living individual because the mouth has saliva that constantly rinses the sperm away. On death the saliva stops and whatever sperm remained at the point of death remains. The expert testified that the amount of sperm found in a body cavity provides a rough guideline as to when the sperm was deposited. "A normal ejaculate contains several millions sperm. . . . So if I were to have a sample . . . that had tails, and I had a lot of sperm with a lot of tails, that would indicate to me that the ejaculate was deposited relatively recently. . . . [¶] If I find a few sperm with no tails, I would surmise that this was not recent ejaculate, but had occurred sometime prior." With regard to the oral cavity, the expert clarified, "If I found a few sperm with no tails, I would say more than likely that it was deposited after about six hours or so, if even I can say that much. I would not expect to see sperm in an oral cavity much past 6 to 8 hours, maybe 12 hours maximum."

In closing argument, the prosecutor argued that the "science" proved that defendant committed the two murders. She stated, "We know that the defendant was a sperm donor of the sperm that was found in Cheryl Walker's oral swab, and it was a single source. . . . [¶] So with knowing that it is his sperm found in Cheryl's mouth, . . . we know at least as to Cheryl and the defendant that those contacts between the two of them was sometime before Cheryl died. That much we know, but science can narrow that down even more for us. . . . There was sufficient amount of sperm found for DNA testing, and the sperm persistence calculation established that the defendant is the killer." She

explained that counting back from the time of death, which was approximately 5:00 a.m., the sperm could not have been deposited much before 11:00 p.m. the night before. She argued that 11:00 p.m. “would have been the outset of when the defendant’s sperm was deposited. . . . [T]hat means at any time between 11:00 p.m., 12:00 [a.m.], 1:00 a.m., 2:00 a.m., 3:00 a.m., any of those times is when the defendant could have deposited that sperm into Cheryl’s mouth . . . . And you know that Cheryl was screaming at 10:30 at night. . . . She was being assaulted and attacked at close to the time when that sperm was being deposited.”

With respect to Gulley, the prosecutor argued “we know that he killed Marsha Gulley” because “his sperm was also found in Marsha’s mouth. It was a single source 1 in 12 trillion. That’s how rare his profile is. . . . [N]ot only that, there was . . . sufficient sperm found for DNA testing which again tells you that the time that the sperm was deposited happened close in time to when Marsha was killed.” She added, “As I explained, the fact that sufficient sperm was found, it means that sufficient sperm was found within for DNA testing, the contact would have been at least within six hours” of when she was killed.

In his closing, defense counsel argued, “the coincidence of sperm being found in the mouth of the two victims does not cause one to believe or accept a theory that somehow or another that means that he committed a murder of these two victims.” He argued that the DNA evidence establishes only that defendant had sexual contact with the victims, but that even under the sperm persistence theory the “very small amount of sperm” found on the oral swabs establishes that the actual sexual conduct took place up to 24 hours before death.

The jury convicted defendant of both murders in the first degree. With respect to Walker, the jury found true the special circumstances of sexual penetration by force. With respect to Gulley, the jury found true the deadly weapon enhancement and the multiple murder special circumstance. The jury did not find true the forced oral copulation special circumstance for either victim.

The court sentenced defendant to two concurrent terms of life in prison without the possibility of parole, consecutive to a one-year term for the deadly weapon enhancement.

## DISCUSSION

### 1. *Pre-indictment Delay*

“ ‘Delay in prosecution that occurs before the accused is arrested or the complaint is filed may constitute a denial of the right to a fair trial and to due process of law under the state and federal constitutions.’ ” (*People v. Lewis* (2015) 234 Cal.App.4th 203, 211-212.) “While not every delay in charging violates the constitution, it is well established that precharging delay can substantially impair a defendant's ability to defend himself at trial. [Citation.] No person should have to stand trial if the delay in charging was so great as to offend basic standards of decency and fair play. [Citation.] [¶] To establish a due process violation, the defendant must prove the existence of actual harm, ‘such as by showing the loss of a material witness or other missing evidence, or fading memory caused by the lapse of time.’ [Citations.] ‘If the defendant establishes prejudice, the prosecution may offer justification for the delay; the court considering a motion to dismiss then balances the harm to the defendant against the justification for the delay. [Citation.]’ [Citation.] ‘The balancing task is a delicate one, “a minimal showing of prejudice may require dismissal if the proffered justification for delay is insubstantial. [Conversely], the more reasonable the delay, the more prejudice the defense would have to show to require dismissal.” [Citation.]’ [Citation.] At bottom, the court must ascertain whether the precharging delay tilted the playing field against the defendant in such a way that it prevented him from receiving a fair trial.” (*People v. Booth* (2016) 3 Cal.App.5th 1284, 1302-1303 (*Booth*).)

When the prosecutor’s conduct has resulted in a loss of evidence favorable to the defense, the court has discretion to fashion an appropriate remedy. (*People v. Conrad* (2006) 145 Cal.App.4th 1175, 1185.) “When . . . delay in prosecution resulted in the loss to the defense of identifiable evidence, the prejudice to the defendant may be substantially mitigated, even virtually eliminated, by presenting the evidence to the jury

through alternate means.” (*Ibid.*) “Dismissal of a prosecution is not called for when a less severe remedy will afford a defendant due process and a fair trial.” (*People v. Price* (1985) 165 Cal.App.3d 536, 545-546.)

Defendant contends he was deprived of his rights to a fair trial and due process by the 20-year pre-accusation delay in this case. He acknowledges that in the trial court defense counsel did not file a motion to dismiss or otherwise seek a remedy for the delay, and that he gave no consideration to doing so. On appeal and in his petition for habeas corpus, defendant argues that his trial counsel rendered ineffective assistance by failing to make the necessary motion. “[A] defendant alleging ineffective assistance of counsel must prove both deficient performance and resulting prejudice. When, as in this case, the allegation is based on counsel’s failure to bring a potentially dispositive motion, the defendant must show it is reasonably probable the motion would have succeeded at trial. [Citation.] We must therefore assess the merits of a motion to dismiss based on the precharging delay in this case. That requires us to balance the prejudice [defendant] suffered from the delay against the state’s justification for the delay.” (*Booth, supra*, 3 Cal.App.5th at p. 1305.)

Defendant contends that as a result of the 20-year charging delay, material witnesses, including Deborah Norman and Marke Taylor, were unavailable at trial.<sup>2</sup> During the investigation into Gulley’s murder, police learned that Deborah Norman last saw Gulley around 2:00 a.m. on February 11—an hour before her dead body was found. Before trial the prosecution summarized the police investigation as follows: “Norman described that a man later identified as Marke Taylor had given Norman a ride home. Seated in the car driven by Taylor were Norman and Gulley. Norman arrived home around 2 a.m. and saw Taylor and Gulley leave southbound on 87th Avenue in Oakland.

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<sup>2</sup> Defendant also asserts that during the delay, both his mother and his best friend passed away. While defendant argues that these witnesses “may have offered information on Willis’s whereabouts or his custom of getting home at certain times and variations to his routine,” he presents no specific testimony that was lost by their passing or any indication that their testimony would have been particularly material.

Taylor was subsequently arrested on a traffic warrant and interviewed.” According to the prosecutor’s summary, Taylor acknowledged giving both Norman and Gulley a ride, but denied any involvement in Gulley’s murder. The police searched the blue Honda for biological evidence. Blood was detected on a glove located inside the car but analysis eliminated Gulley as the source of the blood. Taylor was also eliminated as the source of the sperm from Gulley’s oral swab. Taylor was not charged with Gulley’s murder.

Prior to trial, defense counsel filed a motion asking the prosecution to access its computer system to provide updated information on Taylor’s address. The prosecutor refused and the court denied the motion. At the same time, the prosecution moved to exclude all testimony by “the police or other witnesses concerning Marke Taylor.” During pretrial hearings, additional information regarding Gulley’s contacts with Taylor and Norman was reported. The prosecutor reported that both Gulley and Norman had worked together as prostitutes. Norman told police that Gulley was “a narcotics abuser who earned money to support the narcotics habit through prostitution.” Norman also told police that before she got a ride home from Taylor, Taylor had a conversation with Kenny Roberson. Roberson told police that Taylor asked him for money to buy drugs, which he intended to give to Gulley in exchange for sex.<sup>3</sup> The prosecution argued that because “DNA analysis excluded Taylor as the sperm donor in Gulley’s oral swab and excluded Gulley as the source of the blood found in Taylor’s car, there is no evidence linking Taylor to Gulley’s murder. . . . [¶] Moreover, even if this court decides the fact that Taylor was seen with Gulley shortly before her body was found to be relevant evidence, such testimony can only be elicited from either Taylor or Deborah Norman. If the defense does not have Marke Taylor or Deborah Norman available as witnesses, then the defense should not be permitted to elicit hearsay testimony from the police.”

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<sup>3</sup> The prosecutor and defense counsel also reported to the court that when the blood found in Taylor’s car was tested, Gulley, Taylor and defendant were all eliminated as possible donors. The parties concede that this was partially incorrect. Blood was found on a glove located in the car, which was tested and determined not to belong to Gulley. Blood was also found on the passenger door and seat cover but that blood was never tested.

The trial court acknowledged that the evidence regarding who Gulley was with and where they were immediately prior to the murder was highly probative and would be admissible if established by nonhearsay evidence, such as testimony by Norman or Taylor. The court indicated, however, that their statements could not be admitted by way of the police reports because the reports are hearsay.

At the evidentiary hearing on defendant's habeas petition, defendant offered as exhibits police records of interviews with Norman, Taylor, and Roberson. Contrary to what the prosecutor had told the court at trial, the police report shows that Taylor acknowledged knowing Norman and Roberson and thought Gulley looked familiar but he could not remember whether he gave her and Norman a ride on the night Gulley was killed. According to the police officer's notes, Taylor said "I think I gave [Norman] a ride one time in the blue Honda a few weeks ago." When asked whether Gulley was in the car that time, Taylor responded "I don't remember if she was. I give a lot of people rides." Norman's statements included in the police report, however, are consistent with the prosecutor's summary. Norman remembered Gulley leaving with Taylor at 2:00 a.m., an hour before she was found dead. Defense counsel testified that he had an investigator looking for Taylor and Norman, but the investigator was unable to locate either. He learned at some point that Norman died in 2008.

Norman's testimony would have been exceptionally significant for the defense and its absence was undoubtedly prejudicial. As the trial court observed, evidence that Gulley was seen driving away with Taylor at 2:00 a.m., an hour before her body was recovered, would have been highly relevant. The Attorney General argues, and the trial court ultimately ruled in response to defendant's habeas petition, that even if Norman's statements were admitted, her statements, coupled with the blood evidence, "would not have provided the foundation to permit the defense to argue that Taylor killed Gulley because . . . [w]hile Norman may have placed Gulley and Taylor together less than an hour before Gulley's death, there was no direct or circumstantial evidence connecting Taylor to Gulley's killing." But Norman's testimony would have been relevant to far more than third-party culpability. Regardless of the absence of evidence showing Taylor

to have been the killer, the fact that Gulley was seen alive within an hour of her death makes it less likely that defendant was the killer. The presence of defendant's sperm in Gulley's mouth placed him with her as long as six hours before her death, and conceivably longer. The low number of sperm recovered from the oral swab, according to the expert's testimony regarding the time in which sperm degrades in an oral cavity, indicates the likelihood that the sperm was not deposited shortly before her death. It would have been a reasonable inference that defendant's sperm was deposited in Gulley's mouth hours before she was last seen alive. Moreover, in view of the evidence that Gulley had first been attacked on Hillside Avenue, away from where her body was found, and that she suffered multiple stab wounds before bleeding to death, evidence that she was killed between 2:00 and 3:00 a.m. renders it less likely that the oral copulation and the killing all would have occurred within that short time span. Whoever killed Gulley, the missing evidence that she was alive at 2:00 a.m. rendered the presence of defendant's sperm on the oral swab less significant and would have rendered it less likely that defendant was the killer. The absence of this evidence caused by the 20-year delay in prosecuting defendant substantially prejudiced defendant's defense.<sup>4</sup>

Turning to the justification for the delay, defendant concedes that no one can be faulted for the failure to prosecute during the first 10 years after the killings, but argues that the next 10 years of delay is "squarely attributable to the Oakland Police Crime Lab's failure to act on a 2000 police request to conduct newer DNA typing of the Gulley samples." At trial, evidence was presented that in 2000, when the police first requested testing of samples from both victims, the laboratory determined that only the Walker

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<sup>4</sup> While Taylor was still alive at the time of trial, defense counsel stated that he was unable to locate him. Had he been located, however, his testimony would have been of little significance because in his statement to the police in 1992 he denied any recollection of giving Gulley a ride on the night she was killed. An investigator for defendant's appellate counsel located and interviewed Taylor while preparing defendant's original writ petition. At that time, Taylor could not "remember anything" about Gulley's murder. He denied knowing Norman or Roberson and did not remember being interviewed by the police.

sample contained sufficient material for testing. Although testing on the Walker samples was completed in 2001, the results were not submitted to the FBI's Combined DNA Index System (CODIS) for two more years. In 2003, when the results were submitted to CODIS, defendant was identified as a match to the partial profile found on Walker's oral swab. In 2006, the police requested testing of additional evidence in the Walker case, including DNA testing of the biological material found under Walker's fingernails. This testing was not conducted until 2009. In 2010, defendant was arrested for the murder of Walker, but he was released after the district attorney concluded the evidence was insufficient to justify charges. After defendant's release, the police again requested DNA testing of the Gulley samples. In September 2011, testing of the Gulley samples was completed and defendant was identified as a match for the partial profile found on her oral swab. Based largely on the presence of defendant's DNA on swabs from both victims, defendant was charged with both murders.

At the evidentiary hearing on defendant's habeas petition, the criminalist testified that in 2000, after receiving the request for further DNA testing on the Walker and Gulley samples, she examined part of the Gulley sample but because she did not observe any sperm, she did not proceed with DNA typing. In 2001, she examined the sample again and observed two sperm, but did not conduct DNA testing because the sample contained only 70 picograms of DNA, which was below the sensitivity threshold for the "Profile Plus and COfiler" kits in use by the lab at that time. In 2011, when the police again requested analysis of Gulley's swabs, four sperm were observed on the remaining half of the second swab. Using an advanced quantifying process (Plexor HY), they were able to recover 360 picograms of DNA which satisfied the sensitivity threshold for the "Identifiler Plus" DNA kit then in use by the lab. The criminalist did not believe that the sample tested in 2011 could have been tested for DNA with the kits that were available in 2000 or 2001. She acknowledged that the sample had enough material to create a DNA profile with the kits the lab began using in 2007, but testing was not conducted at that time because no police request was then pending.

Defendant argues that the Gulley sample could and should have been tested in 2000 when first requested. At a minimum, he contends the sample should have been examined in 2007 when the new kit was available. On this record, however, we do not believe the prosecution failed to use reasonable diligence in investigating the two killings. Moreover, even if the Gulley sample had been tested in 2007 and submitted to CODIS, it is doubtful that defendant would have been identified as its source and charged before Norman died in May of 2008. Insofar as the precharging “ ‘delay was investigative delay, nothing else,’ ” the justification for the delay is strong. (*Booth, supra*, 3 Cal.App.5th at p. 1310; *People v. Cordova* (2015) 62 Cal.4th 104, 120 [lengthy precharging delay justified where sufficient evidence to charge the defendant did not exist until DNA technology was developed and used to connect him to the subject offense].)

“When, as here, there is both prejudice from, as well as justification for, the precharging delay that occurred, the question of whether the delay violated due process will often depend on the strength of the prosecution’s case. [Citation.] If the evidence of the defendant’s guilt is strong, the likelihood of consequential prejudice from the precharging delay is reduced and a longer delay will be tolerated, but if the evidence against the defendant is weak, the claimed prejudice will take on added significance and enhance the probability of an unfair trial.” (*Booth, supra*, 3 Cal.App.5th at p. 1310; *People v. Vanderburg* (1973) 32 Cal.App.3d 526, 532–534.)

Here, the prosecution case with respect to both murders was not strong. There was no evidence linking defendant to either killing other than the DNA evidence. As noted above, there is a substantial likelihood that Norman’s testimony would have raised a reasonable doubt as to defendant’s involvement in Gulley’s murder. Although Norman’s testimony would not have related directly to Walker’s murder, the prosecution relied heavily on the fact that the same person’s DNA was found in the oral swabs of both victims, arguing that the modus operandi of the Walker murder was the same as for the

Gulley murder.<sup>5</sup> Without the premise that defendant murdered Gulley, it is reasonably probable that defendant would not have been convicted of killing Walker. Indeed, the prosecutor declined to charge defendant with Walker’s murder until his DNA was found on Gulley. Balancing the prejudice from Norman’s absence against the state’s justification for the pre-charging delay, and considering the weakness of the prosecution’s case, we conclude that defendant’s right to a fair trial required either that the charges against him be dismissed or that the defense be permitted to introduce the police report containing the hearsay evidence of what Norman observed at 2:00 a.m. the night of the Gulley killing. Trial counsel thus provided ineffective assistance in failing to file a motion challenging the pre-charging delay.<sup>6</sup>

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<sup>5</sup> The prosecutor argued, “we know that the defendant killed Marsha [Gulley] because she also fits his MO. . . . Both victims were women; both women were African-American; both were young . . . ; both were defenseless . . . ; both had drugs and alcohol in their system. . . . [¶] . . . [N]either woman was killed in a very fast manner as a gunshot.” The prosecutor also emphasized in rebuttal that both victims were killed on or near Hillside, which “is only two blocks from the defendant’s house.”

<sup>6</sup> The Attorney General does not suggest that counsel had a tactical reason for failing to make a motion to dismiss. Indeed, at the evidentiary hearing defense counsel testified that he did not consider making such a motion. On this record, there can be no doubt but that trial counsel was remiss in failing to make such a motion. (*Booth, supra*, 3 Cal.App.5th at p. 1303.)

In view of the significance of Norman’s missing testimony and of defense counsel’s failure to seek introduction of the police report recording what Norman saw as a remedy for the prejudicial pre-charging delay, we need not consider whether counsel was also remiss in failing to argue that a “DQ Alpha” match between DNA material found on Walker’s vaginal swab and DNA from the rectal swab of a third prostitute victim killed just a month after Walker and two weeks after Gulley in an adjacent Oakland neighborhood, from which defendant was excluded, suggests that another person murdered Walker. As explained at the evidentiary hearing, the DQ Alpha marker “is only one genetic marker, and the frequency of occurrence of the traits that are available, the genotypes that are available range from half of a percent to — depending on the racial group, maybe as high as 40 percent. [¶] So even with a half a percent, that means 5 people out of 200 would have the same DQ Alpha type.” The record reflects that four prostitutes were murdered in the same area around this time and that Monte Crawford pled guilty to the murder of the other two. However, like defendant, Crawford was also excluded as a donor of the particular samples with matching DQ Alpha markers.

In *Booth, supra*, 3 Cal.App.5th at page 1313, the court concluded that the proper remedy in this circumstance was to reverse the conviction and remand for a retrial. The court explained, “Booth’s constitutional right to a fair trial can be accommodated by retrying the case and allowing the jury to hear the exculpatory statements . . . . Despite the hearsay nature of those statements, their admission is necessitated by [the witness’s] unavailability and the unusual circumstances presented in this case. Since [the witness’s] statements have been preserved on tape, the jury will be able to hear exactly what he said and how he said it. We leave to the trial court to decide how best to effectuate this remedy when the matter is retried. So long as the subject evidence is presented to the jury in a manner that protects Booth’s constitutional right to due process and a fair trial, the interests of justice will be served by allowing the prosecution—should they so choose—to retry him for the serious crime that occurred in this case.” (*Ibid.*) The same is true in this instance. While the statements contained in the police reports are hearsay, they are sufficiently preserved and reliable to warrant admission as a remedy for the prejudice otherwise caused by the 20-year delay in prosecuting the case.<sup>7</sup>

Our conclusion that defendant is entitled to a new trial moots the additional arguments asserted in defendant’s habeas petition and in his direct appeal. In anticipation of a possible retrial, however, we make a brief observation regarding defendant’s claim that the court erred in excluding evidence that the victims had worked as prostitutes. In excluding this evidence, the court and the prosecutor focused almost entirely on the relevance of the evidence to establish the victims’ consent. As defendant notes, however, consent was not the issue in this case. The evidence was not offered to show consent but to provide “a plausible explanation for how Willis’s sperm could be found in the mouths of two women violently killed – without him being the killer.” Should the matter be

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<sup>7</sup> Contrary to the Attorney General’s argument, Norman’s belief that Taylor was responsible for Gulley’s murder does not establish that her statements to the police are inherently unreliable. If the matter is retried, the prosecution may argue Norman’s credibility to the jury.

retried, this evidence should be received, subject to whatever limiting instructions the trial court deems appropriate.

**DISPOSITION**

The judgment is reversed and the matter is remanded for a new trial conducted in conformance with the views expressed herein. The appeal is dismissed as moot.

POLLAK, P. J.

WE CONCUR:

STREETER, J.  
TUCHER, J.